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Public-private partnerships (PPPs): Proposed updates to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects

Comments by the World Bank

Note by the Secretariat

The World Bank submitted to the Secretariat a paper for consideration at the fifty-first session of the Commission. The paper is reproduced as an annex to this note in the form in which it was received by the Secretariat.

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The World Bank appreciates the opportunity to review the draft revised Introduction, Chapter I, Chapter II and Chapter III of the updated Guide. We would like to commend the Secretariat, as well as the experts who collaborated to provide inputs, on the draft revised text. The updated Guide will provide an important and timely contribution of critical information for governments, policymakers and other stakeholders operating in the realm of PPPs. Having reviewed the revised drafts referred to above, the World Bank's comments are as follows and focus on Chapter III (Contract Award).

Chapter III Contract Award	
Paragraph reference	Comments
15	Consideration could also be given to the transparency and publication of awarded contracts, and the performance thereof. There is a trend for countries to have laws requiring disclosure of such information and/or for the publication of contracts for public projects (which may in some cases exclude sensitive and proprietary information).
17	The structure proposed for a private partner that is not selected competitively to then select the construction contractor competitively is not an ideal structure and should be seen as sub-optimal. If it is to be discussed here, the challenges created by using such an approach need to also be discussed in detail, so that readers don't assume that since the World Bank may permit such an approach, that it is therefore optimal or preferred. As was recently carried out by the World Bank on the topic of unsolicited proposals (https://library.pppknowledgelab.org/documents/4580), in order to inform the development of guidelines, there should be case study analysis before recommending this approach to see if it brings value for money or other benefits. The unsolicited proposal analysis showed that there are fewer benefits achieved in practice than had previously been assumed, and that there are significant downsides if not well-managed. In our experience, we have seen examples where the approach of competitively subcontracting was used — but this led to high EPC (engineering, procurement and construction) prices since the concessionaire was not incentivized to keep prices low. Such approach also poses challenges for long term sustainability of the relevant project given that project proponents will typically have partners that they work with — and forcing them to work with others may not be sustainable.
23	In PPPs, whole life-cycle costs should also be considered. It is recommended for construction projects to follow this approach also, but it is even more relevant when bidders are free to offer a range of technical proposals to meet the outputs, some of which may be much costlier to operate than others.
36	While *Development Business* is one possible medium of communicating pre-selection processes, it is not the best way to attract international bidders. Parties looking at *Development Business* are generally construction contractors, not necessarily those concession or PPP bidders that the contracting authority will want to attract. Industry journals, conferences, embassy websites and international newspapers are far more effective media.
42	Generally speaking, joint and several liability is not an appropriate requirement for PPP or similar projects as they are long term arrangements and consortium members, particularly the construction member, will want the flexibility to exit the project after a reasonable period. In the case of the consortium member the construction warranties will benefit the project vehicle and/or the employer for the period thereof (typically 10 years). One approach is to require joint and several liability if and until the consortium members form and capitalize an SPV and the SPV enters into the PPP agreement.

	It is not clear why the contracting authority would require an SPV after award as an alternative to joint and several liability. An SPV is the likely approach that joint venture partners will follow as it is a mechanism for achieving limited recourse to their balance sheets (hence the difficulty with imposing joint and several liability on each member), for project financing structures, and perhaps for reasons of tax and (for foreign investors) repatriation of profits through dividends. Governments may see advantage in a special purpose vehicle for a long-term contract where there is significant private financing to ensure that the contracting party does not have other activities or legacy liabilities (i.e., so it is clean) and/or to ensure that the contracting party is incorporated in the jurisdiction of the project (if the lead member of the consortium is not).
53–68	Care needs to be taken in "best and final offer" ("***BAFO***") scenarios that the same information is shared with each bidder, so as to ensure a level playing field. This can be difficult to achieve in practice, even in countries which are familiar with the BAFO process. It should be approached with caution in less developed countries. Generally, competitive dialogue can be challenging for less developed countries, where the direct negotiation of different stages can result in perceptions of impropriety or corruption.
66 onwards	Somewhere there should be a reference to developing a data room (virtual or other); and for pre-bid meetings. There is likely to be a lot of information to be shared with bidders.
74 and 95	In order to limit to a minimum any negotiation of terms once a preferred bidder is selected, it is considered best practice to include a full PPP agreement with the request for proposals, with the opportunity for only very limited amendment on non-substantial terms.
83	Evaluation should look at financiers, the level of due diligence performed, the extent of their commitment and the distance and time to financial close. Transparency should allow increased levels of public accountability to ensure better community engagement, and reduction in abuses of the procurement and implementation processes.
100	The process of allowing a contracting authority to bypass competitive processes must be subject to review and approval of an oversight body, possibly the cabinet/executive agency or a similarly high-level body tasked with reviewing the proposed project and the justification for direct negotiation, whether further to unsolicited proposals or otherwise. In relation to (d): if this is allowed, it needs to be carefully worded as it has been used as an excuse in many projects to allow sole sourcing — but in reality, there are very few circumstances where use of an exclusive technology is truly necessary.
124	Mechanisms such as the "Swiss challenge" procurement method have been shown to be anti-competitive — a recent PPIAF and World Bank report reveals that there are few cases where competitive bids are submitted by bidders other than the proponent as there is a perception of a lack of level playing field and likelihood that the project will go to the proponent.
126	While project proponents will always be keen to stress the innovative aspects of a project, it is seldom the case that a project is in fact that innovative — this premise should be used with great caution.

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Technical cooperation and assistance

Note by the Secretariat

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I. Introduction

1. This note sets out the technical cooperation and assistance activities of the Secretariat subsequent to the date of the previous note submitted to the Commission at its fiftieth session (Vienna, 3–21 July 2017),[1] including those carried out in the region covered by the UNCITRAL Regional Centre for Asia and the Pacific (RCAP) but not initiated by RCAP. Activities initiated and undertaken in the Asia-Pacific region by the UNCITRAL Regional Centre for Asia and the Pacific are set out in a separate document. [2]

2. A separate document on coordination activities[3] provides information on current activities of international organizations related to the harmonization and unification of international trade law and on the role of UNCITRAL in coordinating those activities.

II. Technical cooperation and assistance activities

A. General approaches

3. Technical cooperation and assistance activities undertaken by the Secretariat aim at promoting the adoption and uniform interpretation of UNCITRAL legislative texts. Such activities include providing advice to States considering signature, ratification or accession to an UNCITRAL convention, adoption of an UNCITRAL model law or use of an UNCITRAL legislative guide.

4. Technical cooperation and assistance may involve: undertaking briefing missions and participating in seminars and conferences, organized at both regional and national levels; assisting countries in assessing their trade law reform needs, including by reviewing existing legislation; assisting with the drafting of domestic legislation to implement UNCITRAL texts; assisting multilateral and bilateral development agencies to use UNCITRAL texts in their law reform activities and projects; providing advice and assistance to international and other organizations, such as professional associations, organizations of attorneys, chambers of commerce and arbitration centres, on the use of UNCITRAL texts; and organizing training activities to facilitate the implementation and interpretation of legislation based on UNCITRAL texts by judges and legal practitioners.

5. Some of the key activities undertaken by the Secretariat in the relevant time period are described below. In the experience of the Secretariat, the demand for technical assistance is greater in those areas in which there is a high rate of adoption of UNCITRAL texts (in particular, dispute settlement and electronic commerce). It should be noted that due to lack of resources and time constraints, some of the activities were undertaken by experts on behalf of the Secretariat. Activities denoted with an asterisk were funded by the UNCITRAL Trust Fund for Symposia.

Promotion of the universal adoption of fundamental trade law instruments

6. The Secretariat has continued to engage in promoting the adoption of fundamental trade law instruments, i.e., those treaties that are already enjoying wide adoption and the universal participation in which would seem particularly desirable.

7. The Secretariat has jointly organized, participated in, or contributed to the following events which dealt with a number of areas to which UNCITRAL's work relates:

[1] A/CN.9/905 of 18 April 2017.
[2] A/CN.9/947 of 10 April 2018.
[3] A/CN.9/948 of 2 April 2018.

(a) International symposium "Soft law and international trade law" (Montreal, Canada, 11–12 May 2017);

(b) Hong Kong International Arbitration Centre Conference "The Belt and Road: A Catalyst for Connectivity, Convergence and Collaboration" (Hong Kong SAR, China, 12 May 2017);

(c) Remote participation at the 20th Global Meeting of the Inter-Agency Cluster on Trade and Productive Capacity (Vienna, 17 November 2017).

Initiatives for a regional approach

8. The Secretariat continued its collaboration with the Asia-Pacific Economic Cooperation (APEC) and was granted a three-year guest status at its Economic Committee (EC) from 2017. During the reporting period, the Secretariat participated in meetings of the Economic Committee, Friends of the Chair Group on Strengthening Economic and Legal Infrastructure (SELI), Investment Experts Group (IEG) as well as three workshops organized under the auspices of the APEC Economic Committee and SELI:

(a) Workshop on Starting a Business: Simplified Business Registration and Incorporation according to International Best Practices (Ho Chi Minh City, Vietnam 24 August 2017);

(b) Workshop on the Use of Modern Technology for Dispute Resolution and Electronic Agreement Management (particularly Online Dispute Resolution) (Port Moresby, Papua New Guinea, 3–4 March 2018); and

(c) Workshop on Secured Transactions: Best Practices for Dynamic Business Growth (Mexico City, Mexico, 21–22 March 2018).

9. The Secretariat's participation in the APEC meetings mentioned above was made possible through support from US-ATTARI and the Department of Justice, Hong Kong, China and the APEC Secretariat.

10. The Secretariat also continued its participation in the APEC Ease of Doing Business (EoDB) project on enforcing contracts and getting credit, which aims at strengthening the legislative and institutional framework in APEC economies. In that context, UNCITRAL participated in the EoDB project for improving the getting credit environment in the Republic of Korea (Sydney, Australia, 26–30 June 2017 and Toronto, Canada, 18–20 October 2017); the EoDB project for improving the enforcing contract environment in Viet Nam (Hanoi, Vietnam, 26–30 June 2017); and the wrap-up International Conference on EoDB (Seoul, Republic of Korea, 22 November 2017). The Secretariat's participation in the EoDB project was made possible through voluntary contributions from the Government of the Republic of Korea.

11. It is expected that the Secretariat will continue to cooperate closely with the Republic of Korea, the United States of America, Hong Kong-China and Mexico in implementing the second APEC EoDB Action Plan (2016–2018).

12. Further, the Secretariat continued to be a partner in the project implemented by the *Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH* by appointment of the German Federal Ministry for Economic Cooperation and Development (BMZ) within the Open Regional Fund – Legal Reform. This project entitled "International Dispute Resolution Instruments", comprises two main support pillars. The first of these aims to ensure that South-East Europe (SEE) as a region becomes more involved in the international discussion regarding dispute resolution and participate in the work of UNCITRAL, e.g. in the work of its Workings Groups II and III. The second area of work aims at promoting the use of the UNCITRAL Transparency Standards.

B. Specific activities

Dispute settlement

13. The Secretariat has been engaged in the promotion of UNCITRAL texts in the field of dispute resolution (for example, the UNCITRAL Model Law on International Commercial Arbitration, with amendments as adopted in 2006,[4] UNCITRAL Model Law on International Commercial Conciliation,[5] and the United Nations Convention on Transparency in Treaty-based Investor State Arbitration[6]), including through a number of training activities and has supported the ongoing law reform process in various jurisdictions. The Secretariat has also developed soft law instruments and tools to provide information on the application and interpretation of those texts (reported in A/CN.9/906. The Secretariat has jointly organized, participated in, or contributed to number of events, including:

(a) 24th Vis International Commercial Arbitration Moot (Vienna, 7–10 April 2017);

(b) Kick-off meeting of the GIZ-UNCITRAL Project "Application of International Arbitration Standards in South East Europe" (Budva, 8–10 May 2017);

(c) Coordination meeting with OSCE – to provide information on arbitration instruments as applied by the OSCE (Vienna, 16 May 2017);

(d) International Conference on *"La CNUDCI et l'Afrique"* (Yaounde 24–25 May 2017);*

(e) 44th meeting of experts preceding the *Conseil des Ministres* of OHADA (Conakry, 5–8 June 2017);*

(f) Beijing Arbitration Commission / Beijing International Arbitration Centre Arbitration Summit (Vienna, 21 June 2017);

(g) Meeting on the revision of the OHADA Uniform Act on arbitration (Abidjan, 24–27 July 2017);

(h) ICC Caribbean Conference, judicial sensitization programme and launch of the Jamaica International Arbitration Centre (JAIAC) (Kingston 28–30 August 2017);

(i) Eastern Economic Forum: "Arbitration at the Far East of Russia as the factor of investment attractiveness of the region" (Vladivostok, 6–7 September 2017);*

(j) Ecuador ICC Arbitration Day (Quito, 13–14 September 2017);

(k) Workshop on International Arbitration (Algiers, 19–20 September 2017);

(l) New York Convention Guide Presentation (New York, 11 September and Paris, France, 26 September 2017);

(m) Workshop on International Arbitration (Tblisi, 29–30 September 2017);

(n) Meeting of the International Institute for Conflict Prevention and Resolution (CPR), (Warsaw, 19 October 2017);

(o) Annual conference of the Chartered Institute of Arbitrators (CiArb): "Strengthening the Building Blocks of Arbitration in Africa" (Lagos, 2–3 November 2017);

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[4] *Official Records of the General Assembly, Fortieth Session, Supplement No. 17* (A/40/17), annex I, *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17), annex I (revised articles only).

[5] General Assembly resolution 57/18, annex (model law only).

[6] General Assembly resolution 69/116.

(p) Presentation at the Regional Cooperation Council Meeting (Vienna, 23 November 2017);

(q) The Fourth Conference for a Euro-Mediterranean Community of International Arbitration (Manama, 19 November 2017);

(r) Winter School on ADR followed by an Investment Pre-Moot, (Durres, 20–24 November 2017);

(s) Regional judicial workshops organized by the Commercial Law Development Programme (CLDP), United States Department of Commerce, (Tunis, Tunisia, and Casablanca, 6–14 December 2017);

(t) Celebratory conference for UNCITRAL 50th anniversary with regional arbitration centres (Cairo, 9–10 December 2017);

(u) International Seminar on the Law on Resolution of Economic Disputes and the Centre for Economic Dispute Resolution of the Lao People's Democratic Republic (Vientiane, 14–15 December 2017);

(v) Seminar on the possible reform of the Finnish Arbitration Act, organized by the Finland Arbitration Institute (Helsinki, 25 January 2018);

(w) Vienna Arbitration Days, (Vienna, 26 January 2018);

(x) Briefings for non-signatory States to the New York Convention on the Recognition and enforcement of Foreign Arbitral Awards (New York, 5–9 February 2018);

(y) GIZ Investment Round-table (Tirana, 13–16 February 2018);

(z) Participating in the pre-Moot and arbitrators training (Manama, 21–23 February 2018);

(aa) Investment Moot Frankfurt, including a Round-table "Avoiding War — Arbitration and Other Methods of Resolving International Disputes" (Frankfurt, 16 March 2018);

(bb) Joint UNCITRAL – Ljubljana Arbitration Centre (LAC) Conference (Ljubljana, 20 March 2018);

(cc) 25th Vis International Commercial Arbitration Moot (Vienna, 23–29 March 2018);

(dd) International Conference on the New York Convention on the Recognition and enforcement of Foreign Arbitral Awards (Seville, 5–6 April 2018).

Institutional support

14. Institutional support was provided to a number of events, including "ISDS & Japan: prospective seminar", co-organized with Nagoya University (Tokyo Office) European Business Council and the EU Mission (Tokyo, 8 September 2017).

Review of enacting legislation and assistance with legislative drafting

15. The Secretariat has reviewed or provided comments on legislation on arbitration and/or mediation of a number of jurisdiction including Australia (Capital Territory); Nigeria; Liechtenstein; Kazakhstan; South Africa; Rwanda; Ecuador, Uganda.

Lectures

16. A lecture on dispute resolution was provided to: Danube University Krems (Krems, 30 May 2017).

Electronic commerce

17. The Secretariat has continued promoting the adoption, use and uniform interpretation of UNCITRAL texts on electronic commerce (United Nations

Convention on the use of Electronic Communications in International Contracts (e-CC),[7] UNCITRAL Model Law on Electronic Signatures[8] and UNCITRAL Model Law on Electronic Commerce[9]), including in cooperation with other organizations and emphasizing a regional approach. In that framework, the Secretariat has interacted with legislators and policymakers, including by providing comments on draft legislation. Activities included:

(a) Presentation on existing UNCITRAL texts relevant for cross-border recognition of e-signatures and identity management (IdM) and the ongoing work at WG IV. Coordination with work at UN/CEFACT (EFPE) (Geneva, 29 March 2017);

(b) Remote participation in *IV Congreso Internacional Sobre Derecho Uniforme del Comercio Internacional* (DUCI) (San José, 9–10 May 2017);

(c) Presentation on IdM and e-signatures at the WSIS 2017 Forum. (Geneva, 12 June 2017);

(d) International Seminar on Identification and Digital Transformation (Lima, 1–4 August 2017);*

(e) Second meeting of the WCO Working Group on E-Commerce (WGEC). (Brussels, 10–13 October 2017);

(f) Conference "Supply Chain Finance (SCF) and the Changing Landscape of International Trade" (Gothenburg, 23–24 October 2017);

(g) 4th Summit of Electronic World Trade Platform (Hangzhou, 26–29 October 2017);

(h) UN ECE Working Party on Road Transport (SC.1) Special session (Geneva, 3–4 April 2018).

18. A number of related activities took place in the region covered by RCAP:

(a) Capacity-Building Workshop on Cross-border Paperless Trade Facilitation: Implications of Emerging Technologies (Bangkok, 21–22 March 2018);

(b) Fourth Meeting of the Interim Intergovernmental Steering Group on Cross-Border Paperless Trade Facilitation (Bangkok, 22–23 March 2018).

Review of enacting legislation and assistance with legislative drafting

19. The Secretariat discussed with stakeholders in the legislative process of adoption of e-commerce texts in Bahrain (Manama, 16–19 May 2017). The Secretariat has reviewed or provided comments on legislation on electronic commerce of a number of jurisdiction including Sri Lanka and Haiti.

Lectures

20. A lecture on e-commerce at the ITC-ILO Master of Laws in International Trade Law (Turin, 11–12 May 2017).

Insolvency

21. The Secretariat has promoted the use and adoption of insolvency texts (UNCITRAL Model Law on Cross-Border Insolvency [10] and the UNCITRAL Legislative Guide on Insolvency Law[11]) by disseminating information about those texts to Government officials, legislators, judges, academics and practitioners and thus promoting their implementation and consulting with legislators and

[7] General Assembly resolution 60/21, annex.
[8] General Assembly resolution 56/80, annex (model law only).
[9] General Assembly resolution 51/162, annex (model law only).
[10] General Assembly resolution 52/158, annex.
[11] United Nations publication, Sales No. E.05.V.10.

policymakers from various jurisdictions to review enacting legislation and assist with legislative drafting. Activities relating to the dissemination of information included:

(a) Conference new corporate insolvency regime (New Delhi, 28–29 April 2017);

(b) VII St Petersburg International Legal Forum (St Petersburg, 17–19 May);*

(c) International Insolvency Institute 17th annual session (III) (London, 18–20 June 2017);

(d) European Law Institute annual session (ELI) (Vienna, 6 September 2017);

(e) 8th Africa Roundtable on Insolvency Reform (Port Louis, 9–10 November 2017).*

Lectures

22. The Secretariat has delivered a lecture on UNCITRAL development on secured transactions and insolvency law at the Academy of European Law (ERA) Conference on EU Insolvency Law (Trier, Germany, 8–9 June 2017).

Procurement and infrastructure development

23. The Secretariat has continued cooperation with other international organizations active in public procurement reform to support the use of the UNCITRAL Model Law on Public Procurement (2011) (the "Procurement Model Law"),[12] its accompanying Guide to Enactment (2012),[13] and the UNCITRAL texts on Privately-Financed Infrastructure Projects.[14]

24. The aims of such cooperation are to ensure that reforming Governments and organizations are informed of the terms of and the policy considerations underlying those texts, including as regards regional requirements and circumstances, so as to promote a thorough understanding and appropriate use of these UNCITRAL texts.[15] The Secretariat is following a regional approach to this cooperation, engaging with the multilateral development banks and regional organizations, addressing the role of public procurement in sustainable development, trade facilitation, good governance and the avoidance of corruption and achieving value for money in government expenditure.

25. The main activities and international events in the year to April 2018, in which the Secretariat has participated as speaker/presenter include the following:

(a) Fifth Annual Conference of the South Asia Region Public Procurement Network (SARPPN) on "Public Procurement and Service Delivery" (New Delhi, 5–9 February 2018);

(b) 3rd workshop on Professionalization in Public Procurement (Zagreb, 28 April 2017);

(c) 13th Procurement, Integrity, Management and Openness (PRIMO) Forum on *Curbing Corruption in Public Procurement* (Kiev, 23–24 May 2017);

(d) International conference: "Modernization of Infrastructure in Ukraine: New Opportunities for Private Business Participation" (remote participation) (Kiev, 27 May 2017);*

[12] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), annex I.

[13] Available at www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure.html.

[14] The UNCITRAL Legislative Guide (with Legislative Recommendations) and its Model Legislative Provisions on Privately-Financed Infrastructure Projects, available at www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure.html.

[15] See documents A/CN.9/575, paras. 52 and 67, A/CN.9/615, para. 14, and A/66/17, paras. 186–189.

(e) Public Procurement: Global Revolution VIII Conference (Nottingham, 12–14 June 2017);

(f) Colloquium on Suspension and Debarment (Washington, DC, 14 September 2017);

(g) 7th Conference of the States Parties to the United Nations Convention against Corruption (Vienna, 8 November 2017);

(h) GPA Academy on Promoting Trade, Good Governance and Inclusive Sustainable Development (Geneva, 20 November 2017);

(i) Workshop on "Prevention of Trafficking in Human Beings in Supply Chains through Government Practices and Measures" (Geneva, 23 November 2017);

(j) Contribution to "Public Procurement and Human Rights: Opportunities, Risks and Dilemmas for the State as Buyer", University of Greenwich/Olga Martin Ortega and Claire Methven O'Brien, 2019 (London, 5–7 April 2018).

Review of enacting legislation and assistance with legislative drafting

26. The Secretariat has provided advice to the Government of Azerbaijan on drafting a new law on public procurement, in the context of the implementation of the EBRD-UNCITRAL Public Procurement Initiative.

Lectures

27. The Secretariat participated as a lecturer in:

(a) 11th and 12th editions of ITC-ILO Master in Public Procurement for Sustainable Development (Turin, Italy, 30 May 2017 and 6 and 7 February 2018);

(b) Lecture at the International Anti-Corruption Academy (IACA) on UNCITRAL Model Law and the EBRD — UNCITRAL Initiative on Enhancing Public Procurement Regulation in the EAEU Countries" (Laxenburg, 3 October 2017);

(c) Lecture at IACA on "Public Procurement — International Perspective" (Laxenburg, 17 November 2017);

(d) Presentation at IACA during a workshop on public procurement to Kosovo senior government officials and UNDP (Laxenburg, 11 December 2017).

Sale of goods

28. The Secretariat has continued to promote broader adoption, use and uniform interpretation of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) ("CISG"),[16] and of the Convention on the Limitation Period in the International Sale of Goods (New York, 1974), as amended (Vienna, 1980).[17]

29. It is in particular noteworthy the remote participation of the Secretariat participated in events hearing on the CISG at the Economic Commission of the Congress of Guatemala (Guatemala City, 28 June 2017).

Security interests

30. UNCITRAL has produced a number of complementary texts in the area of secured transactions: the United Nations Convention on the Assignment of Receivables in International Trade (2001),[18] the UNCITRAL Legislative Guide on Secured Transactions (2007),[19] its Supplement on Security Rights in Intellectual

[16] United Nations, *Treaty Series*, vol. 1489, No. 25567.
[17] United Nations, *Treaty Series*, vol. 1511, No. 26121.
[18] General Assembly resolution 56/81, annex.
[19] United Nations publication, Sales No. E.09.V.12.

Property (2010), the UNCITRAL Guide on the Implementation of a Security Rights Registry (2013)[20] and the UNCITRAL Model Law on Secured Transactions (2016).[21]

31. The Secretariat is continuing its cooperation with the World Bank to support law reforms based on UNCITRAL texts on security interests.

Transport Law

32. The Secretariat has participated in a roundtable of key stakeholders to discuss advantages of ratification of the Rotterdam Rules. (Singapore, 27 November 2017).

III. Dissemination of information

33. A number of publications and documents prepared by UNCITRAL serve as key resources for its technical cooperation and assistance activities, particularly with respect to dissemination of information on its work and texts.

A. Website

34. The UNCITRAL website, available in the six official languages of the United Nations, provides access to full-text UNCITRAL documentation and other materials relating to the work of UNCITRAL, such as publications, treaty status information, press releases, events and news. In line with the organizational policy for document distribution, official documents are provided, when available, via linking to the United Nations Official Document System (ODS).

35. In 2017, the website received over 1,000,000 unique visitors, an increase from 2016 (800,000 unique visitors). Of all sessions, roughly 63 per cent were directed to pages in English and 37 per cent to pages in Arabic, Chinese, French, Russian and Spanish. In this respect, it should be noted that, while the UNCITRAL website is among the most important electronic sources of information on international trade law in all languages, it may represent one of few available sources on this topic in some of the official languages.

36. The content of the website is updated and expanded on an ongoing basis in the framework of the activities of the UNCITRAL Law Library and therefore at no additional cost to the Secretariat. The General Assembly has welcomed "the continuous efforts of the Commission to maintain and improve its website, including by developing new social media features, in accordance with the applicable guidelines."[22] In this regard, in September 2015, a general UNCITRAL LinkedIn account was established that now has over 3,600 followers, an increase from 1,900 in the last year. This account supplements the Tumblr microblog ("What's new at UNCITRAL?") established in 2014. Both features are accessible from the UNCITRAL website.

B. Library

37. Since its establishment in 1979, the UNCITRAL Law Library has been serving research needs of Secretariat staff and participants in intergovernmental meetings convened by UNCITRAL. It has also provided research assistance to staff of Permanent Missions, global staff of the United Nations, staff of other Vienna-based international organizations, external researchers and law students. In 2017, library staff responded to approximately 480 reference requests, originating from

[20] General Assembly resolution 68/108.

[21] General Assembly resolution 71/136, *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), chap. III, sect. A.

[22] General Assembly resolution 70/115.

over 45 countries. Library visitors other than meeting participants, staff and interns included researchers from over 24 countries.

38. The collection of the UNCITRAL Law Library focuses primarily on international trade law and currently holds over 12,000 monographs, 100 active journal titles, legal and general reference material, including non-UNCITRAL United Nations documents, documents of other international organizations and electronic resources (restricted to in-house use only). Particular attention is given to expanding the holdings in all of the six United Nations official languages. While use of electronic resources has increased, resources on trade law from many countries are still only found in print, and circulation of print items has remained steady.

39. The UNCITRAL Law Library maintains an online public access catalogue (OPAC) jointly with the other United Nations libraries in Vienna. OPAC is available via the library page of the UNCITRAL website.[23]

40. The UNCITRAL Law Library staff prepares for the Commission an annual "Bibliography of recent writings related to the work of UNCITRAL". The bibliography includes references to books, articles and dissertations in a variety of languages, classified according to subject. [24] Individual records of the bibliography are entered into OPAC, and the full-text collection of all cited materials is maintained in the Library collection. Monthly updates from the date of the latest annual bibliography are available in the bibliography section of the UNCITRAL website.

41. The Library produces a consolidated bibliography of writings related to the work of UNCITRAL on the UNCITRAL website.[25] The consolidated bibliography aims to compile all entries of the bibliographical reports submitted to the Commission since 1968. It currently contains over 9,970 entries, reproduced in the English and the original language versions, verified and standardized to the extent possible.

C. Publications

42. In addition to official documents, UNCITRAL traditionally maintains two series of publications, namely the texts of all instruments developed by the Commission and the UNCITRAL Yearbook. Publications are regularly provided in support of technical cooperation and assistance activities undertaken by the Secretariat, as well as by other organizations where the work of UNCITRAL is discussed, and in the context of national law reform efforts.

43. The publications appeared in 2017: UNCITRAL Technical Notes on Online Dispute Resolution, [26] UNCITRAL Model Law on Electronic Transferable Records (2017), [27] Modernizing International Trade Law to Support Innovation and Sustainable Development: Proceedings of the Congress of the United Nations Commission on International Trade Law, Vienna, 4–6 July 2017 (vol. 4: Papers Presented at the Congress), [28] and UNCITRAL Model Law on Secured Transactions: Guide to enactment. [29] The 2014 UNCITRAL *Yearbook* was submitted for publication in 2017 and the 2015 *Yearbook* will be submitted within April 2018.

44. In light of budget and environmental concerns, the Secretariat has continued its efforts to use electronic media as a primary method to disseminate UNCITRAL texts. Thus, print runs for all publications have been reduced and the 2013 UNCITRAL *Yearbook* was published exclusively in electronic format (CD-ROM and e-book).

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[23] Available from www.uncitral.org/uncitral/en/publications/publications.html.
[24] For the fifty-first Commission session, see A/CN.9/929.
[25] Available from www.uncitral.org/uncitral/en/publications/publications.html.
[26] Available from www.uncitral.org/uncitral/en/publications/publications.html.
[27] Available from www.uncitral.org/uncitral/en/publications/publications.html.
[28] Available from www.uncitral.org/uncitral/en/publications/publications.html.
[29] Available from www.uncitral.org/uncitral/en/publications/publications.html.

D. Press releases

45. Press releases are being regularly issued when treaty actions relating to UNCITRAL texts take place or information is received on the adoption of an UNCITRAL model law or other relevant text. Press releases are also issued with respect to information of particular importance and direct relevance to UNCITRAL. Those press releases are provided to interested parties by e-mail and are posted on the UNCITRAL website, as well as on the website of the United Nations Information Service (UNIS) in Vienna or of the Department of Public Information, News and Media Division in New York, if applicable.

46. To improve the accuracy and timeliness of information received with respect to the adoption of UNCITRAL model laws, since such adoption does not require a formal action with the United Nations Secretariat, and to facilitate the dissemination of related information, the Commission may wish to request Member States to advise the Secretariat when enacting legislation implementing an UNCITRAL model law.

E. General enquiries

47. The Secretariat currently addresses approximately 2,000 general enquiries per year concerning, inter alia, technical aspects and availability of UNCITRAL texts, working papers, Commission documents and related matters. Increasingly, these enquiries are answered by reference to the UNCITRAL website.

F. Information lectures in Vienna

48. Upon request, the Secretariat provides information lectures in-house on the work of UNCITRAL to visiting university students and academics, members of the bar, Government officials including judges. Since the last report, the Secretariat offered 14 lectures to visitors from Austria, France, Germany, Hungary, Netherland, Poland, Turkey and the United Kingdom.

IV. Resources and funding

49. The costs of most technical cooperation and assistance activities are not covered by the regular budget. The ability of the Secretariat to implement the technical cooperation and assistance component of the UNCITRAL work programme is therefore contingent upon the availability of extra budgetary funding.

50. The Secretariat has explored a variety of ways to increase resources for technical assistance activities, including through in-kind contributions. In particular, a number of missions have been funded, in full or in part, by the organizers. Additional potential sources of funding could be available if trade law reform activities could be mainstreamed more regularly in broader international development assistance programmes. In this respect, the Commission may wish to provide guidance on possible future steps.

A. UNCITRAL Trust Fund for symposia

51. The UNCITRAL Trust Fund for symposia supports technical cooperation and assistance activities for the members of the legal community in developing countries, funding the participation of UNCITRAL staff or other experts at seminars where UNCITRAL texts are presented for examination and possible adoption and fact-finding missions for law reform assessments in order to review existing domestic legislation and assess country needs for law reform in the commercial field.

52. For 2017, the released budget amounted to US$ 100,005.00, and the total expenditure was US$ 50,036.14. During the period, the Government of the Republic of Korea made a contribution of US$ 23,211.77 for the participation of the UNCITRAL Secretariat in the APEC EoDB project (see para. 11).

53. At its 49th Session (New York, 27 June–15 July 2016), the Commission appealed to all States, international organizations and other interested entities to consider making contributions to the Trust Fund for UNCITRAL symposia, if possible, in the form of multi-year contributions, or as specific-purpose contributions, so as to facilitate planning and enable the Secretariat to meet the increasing requests from developing countries and countries with economies in transition for training and technical legislative assistance (A/71/17, paras. 249–251). Potential donors have also been approached on an individual basis.

54. The Commission may wish to note that, in spite of efforts by the Secretariat to solicit new donations, funds available in the Trust Fund are sufficient only for a very small number of future technical cooperation and assistance activities. Efforts to organize the requested activities at the lowest cost and with co-funding and cost sharing whenever possible are ongoing. However, once current funds are exhausted, requests for technical cooperation and assistance involving the expenditure of funds for travel or to meet other costs will have to be declined unless new donations to the Trust Fund are received or alternative sources of funds can be found.

55. The Commission may once again wish to appeal to all States, relevant United Nations Agencies and bodies, international organizations and other interested entities to make contributions to the Trust Fund, if possible in the form of multi-year contributions, so as to facilitate planning and to enable the Secretariat to meet the demand for technical cooperation and assistance activities and to develop a more sustainable technical assistance programme. The Commission may also wish to request Member States to assist the Secretariat in identifying sources of funding within their Governments.

B. UNCITRAL Trust Fund to grant travel assistance to developing countries that are members of UNCITRAL

56. The Commission may wish to recall that, in accordance with General Assembly resolution 48/32 of 9 December 1993, the Secretary-General was requested to establish a Trust Fund to grant travel assistance to developing countries that are members of UNCITRAL. The Trust Fund so established is open to voluntary financial contributions from States, intergovernmental organizations, regional economic integration organizations, national institutions and non-governmental organizations, as well as to natural and juridical persons.

57. During the same reporting period, the available Trust Fund resources were used to facilitate participation at the 50th session of UNCITRAL in Vienna (3–21 July 2017) for one delegate from Honduras. Owing to the limited resources, only partial assistance could be provided.

58. Resources have been made available by the European Union and the Swiss Agency for Development and Cooperation (SDC) to provide financial support for the participation of developing countries at UNCITRAL Working Group III "Investor-State Dispute Settlement reform" which have been used to facilitate participation at the 35th session of Working Group III in New York (23–27 April 2018) for delegates from El Salvador and Sri Lanka, as the agreement between the United Nations and the EU also covers the funding of travel to States that are not currently members of UNCITRAL.

59. During the same reporting period, the available Trust Fund resources were used to facilitate participation at the 49th session of UNCITRAL in New York (27 June–15 July) for delegates from El Salvador, Honduras and Sri Lanka, and for participation in the 29th session of Working Group VI in New York (8–12 February), the

53rd session of Working Group IV in New York (9–13 May) and the 65th session of Working Group II in Vienna (12–23 September) for delegates from Armenia, Côte d'Ivoire and Sierra Leone. In order to allow for broader assistance despite the limited resources of the fund, cost coverage in each case has been provided either for the air ticket or for the Daily Subsistence Allowance only.

60. In order to ensure participation of all Member States in the sessions of UNCITRAL and its Working Groups, the Commission may wish to reiterate its appeal to relevant bodies in the United Nations system, organizations, institutions and individuals to make voluntary contributions to the Trust Fund established to provide travel assistance to developing countries that are members of the Commission.

61. It is recalled that in its resolution 51/161 of 16 December 1996, the General Assembly decided to include the Trust Funds for UNCITRAL symposia and travel assistance in the list of funds and programmes that are dealt with at the United Nations Pledging Conference for Development Activities.

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Possible future work

Proposal by the Governments of Italy, Norway and Spain: future work for Working Group II

Note by the Secretariat

1. In preparation for the fifty-first session of the Commission, the Governments of Italy, Norway and Spain have submitted to the Secretariat a joint proposal in support of future work in the area of international commercial arbitration. The English version of that note was submitted to the Secretariat on 27 April 2018. The text received by the Secretariat is reproduced as an annex to this note in the form in which it was received.

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Annex

Expedited Arbitration, emergency arbitrator and adoption of other instruments for the efficiency and quality of arbitral proceedings

1. Since its sixty-third session, in September 2015, Working Group II has been working on instruments for the enforcement of international commercial settlement agreements resulting from mediation. During its sixty-eighth session, in February 2018, the Working Group completed its work on this topic. The result of the Working Group's endeavors will be submitted to the Commission at its fifty-first session. At the same session, the Commission will also consider topics for possible future work of Working Group II. During its sixty-eighth session, Working Group II considered possible input for the discussion on future work.

Mediation: modernization of the terminology

2. During the sixty-eighth session of Working Group II, the Secretariat informed delegations that possible future work could consist in modernizing and refining the existing UNCITRAL instruments on mediation, as well as in developing notes on organizing mediation proceedings. As indicated in document A/CN.9/934, at para. 163, delegations supported those suggestions including that such work should be performed by the Secretariat itself, and then submitted for review and approval to the Commission.

Topics for the Working Group's future work

3. As regards topics for future work of Working Group II, a few proposals were presented at the sixty-eighth session. Among others, a joint proposal was presented by the delegations of Switzerland and of the United States of America ("the Swiss-USA proposal"), suggesting that the Working Group could work on the topics of expedited arbitration and adjudication. Particularly, the part of the Swiss-USA proposal relating to expedited arbitration received support. This part is also covered by the proposal that was presented by a number of delegations (Italy, Norway and Spain) and very likely supported by other delegations representing States both from and outside the European Union, as explained in this document.

4. The present proposal is not meant to be in alternative to the Swiss-USA Proposal but it aims to enhance aspects of that proposal that have a great relevance in the arbitration practice and a large potential for constructive use of the Working Group resources and competence. Therefore, it seems not only possible but also advisable to join the two proposals under the title "*Expedited Arbitration, emergency arbitrator and adoption of other instruments for the efficiency and quality of arbitral proceedings*".

5. The proposal explained in this document is based on the assumption that Working Group II should devote its expertise and capacity to the development of instruments that may contribute to the enhancement of arbitration as a method for settlement of international commercial disputes. Arbitration is increasingly under pressure and threatened to lose its role as preferred means for dispute resolution for commercial disputes. Arbitration is under a double pressure: on the one hand, arbitral proceedings are getting increasingly complicated, and they expand both in terms of time frame and in terms of volume of documentation. This challenges one of the traditional advantages of arbitration as opposed to court litigation, namely efficiency.

6. On the other hand, measures taken by arbitral tribunals or arbitral institutions are increasingly faced with court control. Possibly for the sake of preserving efficiency in a scenario where disputes get more complicated, steps may be taken that do not necessarily meet the quality criteria that arbitration is expected to meet. In order to render a valid arbitral award, and in order to obtain enforcement of the award, arbitration needs to comply with a series of fundamental principles, such as the

principle of due process. The goal of ensuring efficient arbitration may lead to taking steps that compromise the quality of arbitration. This, in turn, may erode the trust in arbitration as a method for settlement of disputes, a trust that is the very foundation of the success of arbitration.

7. The aim of the present proposal is to supply Working Group II with a basis to develop instruments that are meant to ensure a balance between efficiency and quality: "*Expedited Arbitration, emergency arbitrator and adoption of other instruments for the efficiency and quality of arbitral proceedings*".

8. The balance between efficiency and quality would be the overarching principle that inspires more specific topics, within which this balance may manifest itself. The subtopics would address specific issues that today negatively affect the development of commercial arbitration.

Why commercial arbitration

9. The proposed topic implies that the Working Group devotes its attention to arbitration, leaving the topic of meditation to be handled by the Secretariat as indicated above.

10. There are various reasons why we consider it advisable that the Working Group returns to the field of commercial arbitration.

11. Firstly, Working Group II has been mandated with a "double mission", focused on mediation and arbitration: a new round of sessions devoted to mediation will keep the Working Group away from one of its two missions for too long (realistically, 7 or 8 years).

12. Secondly, if Working Group II does not deal with commercial arbitration, there is a risk that arbitration be absorbed in Working Group III, that deals with investment arbitration. Working Group III has been constituted with a political and broader mandate, focused not only on arbitration itself (specifically, on investment arbitration), on its need to be improved and on the "corrections" to be adopted, but also on ISDS. It should be then kept in mind that the identified issues regarding investment arbitration are not common with commercial arbitration, being directly related to its features and its political implications. Commercial arbitration is a very private system, limited to the parties of the case — most of the time, private companies — and with no general or public interests involved. Therefore, there is no competition between the two Working Groups.

13. Furthermore, the merge of the two systems is very risky for commercial arbitration and its proximity with investment arbitration may pollute the many advantages of commercial arbitration.

14. Last but not least, it seems wiser — before dealing with mediation issues again — to wait for the impact of the new "mediation instruments" that will be submitted to the Commission (Convention and Model Law on enforcement of international commercial settlement agreements resulting from mediation) and see how their implementation may progress. Therefore, it is advisable to keep mediation on hold, focusing on arbitration for the next "round" of work of Working Group II.

Why efficiency and quality of arbitration

15. Today, commercial arbitration is increasingly criticized by users and practitioners, for different reasons (some of them grounded, others probably not).

16. One of the major criticisms is related to the excess of regulation and to the tendency of the arbitral process to look like a State court proceedings. This phenomenon leads to a lack of efficiency.

17. Furthermore, also the quality of arbitration (and of the arbitrators) seems to undermine the legitimacy of the system and the enforceability of the outcome.

18. As it has been properly highlighted in the Swiss-US proposal, there is a wide concern among practitioners "about rising costs and lengthier timelines making arbitration more burdensome and too similar to litigation".

19. For these reasons, an intervention by UNCITRAL, aimed at increasing the efficiency and the quality of arbitration, rendering the proceedings more expedite (quoting the Swiss-US proposal), is of fundamental importance for the future of commercial arbitration.

20. Trying to develop, under the umbrella of an organization such as UNCITRAL, instruments able to improve the efficiency and the quality of arbitration, seems the proper action to be taken today in order to increase the reliability of the system as a whole.

21. Working Group II looks particularly suited to meet the expectations in terms of competence and membership (representing all regions and including relevant organizations), inducing harmonization through persuasive authority.

22. Furthermore, Working Group II has the capacity not only to propose soft law interventions but also instruments of legislative character, where needed, balancing the need for efficient and quality arbitration proceedings, due process and party autonomy.

23. The topic proposed — starting from the one of the Swiss-US proposal — is a fertile basis for work aimed at improvement of the mechanism of arbitration as a tool for dispute resolution in commercial disputes. It will give UNCITRAL the possibility to meet the growing criticism that is facing arbitration and answer to the different demands that are present in practice and contributing to streamlining dispute resolution mechanisms. This fits perfectly with the Commission's functions and mission.

Focus on some topics of growing importance in the arbitration practice

24. Under the wide topic of "*Expedited Arbitration, emergency arbitrator and adoption of other instruments for the efficiency and quality of arbitral proceedings*", Working Group II may work on various specific topics with practical relevance, such as:

- Expedited arbitration (Swiss-US proposal)
- Basic uniform principles for arbitral institutions' rules
- Emergency arbitrator

25. Working Group II may develop instruments for each of these topics that will represent concrete tools able to reduce cost and time of the arbitral process, increasing its efficiency without compromising the quality.

26. Each of these topics may be dealt with independently, and in the next future new topics may be also added to the list (such as, for example, "Arbitration clauses and non-signatory parties", "Legal privileges and international arbitration"). The proposal is to use the overarching principles of efficiency and quality as a red thread for future work. Which specific topic the Working Group may work on, may be discussed from time to time. The discussion at the sixty-eighth session seemed to indicate that the topic of expedited arbitration is considered to be an appropriate topic by a vast number of delegations. This could be the first topic on which the Working Group could concentrate.

Expedited arbitration

27. The very first topic on which Working Group II should focus its work is the development of model rules — starting from the UNCITRAL Arbitration Rules — or contractual clauses (or similar tools) facilitating the use of expedited arbitration procedures and, doing so, reducing time and cost of an arbitration.

28. Expedited arbitration is a form of arbitration that is carried out in a shortened time frame and at a reduced cost. As it has been highlighted in the Swiss-US proposal, UNCITRAL may well assist users either modifying the UNCITRAL Arbitration Rules or incorporating them into contracts via arbitration clauses that provide for expedited procedures (for example, limiting the number of submissions that the parties can file, imposing shorter deadlines, referring the case to a sole arbitrator etc.). The work could also consist in guidance to arbitral institutions adopting such procedures in order to provide for the right balance between speedy resolution of the process and respect of due process, as indicated below.

Basic uniform principles for Arbitral Institutions' Rules

29. This topic is strictly related to the previous subject (expedited arbitration).

30. Today, around the world, there are an indefinite number of arbitral institutions, of different nature, dimension, range of action, competence.

31. Many of them have proved to work well, others seem to be not very active and their existence is purely formalistic, few have a very poor level of efficiency and competence. Of course, this last group is very dangerous, and it risks to undermine the efforts put by all the other institutions for the promotion of a quality and reliable arbitration system.

32. We should keep in mind that arbitration is a means for resolution of disputes based on contractual will of the parties who have to be fully convinced of the competence, reputation and reliability of the institutions.

33. Working Group II may well develop an exchange of best practices among arbitral institutions and elaborate common principles and standards in administering arbitral procedures, not only related to the expedite proceedings as described above.

34. This process will give to the entrepreneurs the benefit of seeing applied homogenized criteria and guarantees whatever arbitral institution they choose on the basis of the characteristics of their case, finally increasing the trust of the parties in the system and in arbitration as a whole.

35. The aim of this work should not be the homogenization of arbitral institutions rules (that each centre should be free to adopt) but the development of common principles and the application of the highest international standards in the administration of arbitral proceedings by the Centres "*UNCITRAL's principles compliant*".

36. Working Group II may focus, among others, not only on speedy resolution of the dispute and due process (two major points of the above mentioned subtopic of expedited arbitration) but also on other principles, which are considered to be decisive for the "good" administration of arbitral proceedings, such as independence/impartiality and multi-party arbitration.

Emergency arbitrators

37. A relatively recent trend in international arbitration is the appointment of emergency arbitrators. The underlying idea is that, in cases of particular urgency, a party may need to seek preliminary measures even before the arbitral tribunal has been appointed. To meet this need for urgency, some institutions offer the services of an emergency arbitrator, who may render an interim order, without having to wait for the arbitral tribunal to be appointed.

38. The use of emergency arbitrators may give rise to a series of questions, of which the most important is the enforceability of the measures ordered by the emergency arbitrator.

39. There does not seem to be a uniform approach in this area. If the relief ordered by an emergency arbitrator is not enforceable, there is the risk that the party seeking relief has to apply an ordinary court for the same relief. This means a multiplication of the time and costs connected with the preliminary measure.

40. In order to ensure the effectiveness of emergency arbitrators, it would be necessary to regulate their enforceability in an international instrument. UNCITRAL is ideally positioned to propose such an instrument.

The instrument(s) to be adopted

41. Depending on the issues discussed, the Working Group may well work on different tools, addressing soft law principles, best practices, notes, recommendations or legislative provisions. We believe that these sub-topics would give the possibility to issue uniform principles of soft law, either restating existing principles and best practices, or proposing normative interventions, as opposed to Notes (therefore, descriptive, alternatives and not as "best rules").

42. For all these reasons, we suggest that the Working Group be given by the Commission the mandate to start working on "*Expedited Arbitration, emergency arbitrator and adoption of other instruments for the efficiency and quality of arbitral proceedings*", starting with the topic on expedited proceedings as under the Swiss-US Proposal.

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